Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-1968

EDWIN F. GORDON,

Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM; FEDERAL RESERVE BANK OF ATLANTA; MONROE KIMBREL, PRESIDENT, FEDERAL RESERVE BANK OF ATLANTA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Date: June 13, 1980

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BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM; FEDERAL RESERVE BANK OF ATLANTA; MONROE KIMBREL, PRESIDENT, FEDERAL RESERVE BANK OF ATLANTA,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

The petitioner, Edwin F. Gordon, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 19, 1980.

Opinion Below

The order of the Court of Appeals appears in the Appendix hereto and is not accompanied by any opinion.

## Jurisdiction

The order of the Court of Appeals for the Fifth Circuit was entered on March 19, 1980. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC 1254(1).

## Questions Presented

1. Whether the Court of Appeals has authority to correct the Board of Governors' unreasonable and arbitrary abuse of discretion.

2. Whether the petitioner has standing to challenge the Board of Governors' abuse of discretion.

## Statutory Provisions Involved

Title 12 USC 1848

Title 5 USC 702

## Statement of the Case

Petitioner is a citizen of the State of Florida who was fraudulently induced to invest in excess of $4 million in securities administered by the Trust Departments of the First National Bank in Palm Beach, Palm Beach, Florida, trustee, and of the First National Bank and Trust Company of Riviera Beach, Riviera Beach, Florida, as successor trustee, both banks being subsidiaries of registered bank holding companies, respectively, the Lykes Financial Corporation and Southeast Merger Company (formerly First Bancshares of Florida, Inc.), which are examined and supervised by the Respondents pursuant to their statutory authority.

Repeatedly the Petitioner has brought to the attention of the Respondent that these bank holding companies, through the Trust Departments of their subsidiary banks, in concert with others, have aided and abetted in schemes and devices to defraud the Petitioner in connection with the sale to him of securities in the form of participations in investment contracts. The Petitioner has claimed violation by these bank holding companies and their subsidiary national banks of several Federal statutes. Among the alleged violations were the following:

> Glass-Steagall Act, 12 USC 24(7), 12 USC 78, 12 USC 374a, 12 USC 377 and 12 USC 378.
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> Securities Act of 1933, 15 USC 77a et seq.
>
> Securities Exchange Act of 1934, 15 USC 78a et seq.
>
> 12 USC 1971-1978
>
> Bank Holding Company Act, 12 USC 1841-1850

In spite of Petitioner's well-documented allegations, the Respondent refused to investigate the charges "for the reason that they [the bank holding companies] were not alleged to have engaged in any illegal activities." Whereupon the Petitioner petitioned the Court of Appeals for the Fifth Circuit for a review of the Respondent's action.

## Reasons for Granting the Writ

1. The order below denies the Petitioner judicial review of arbitrary and capricious administrative action.

Title 12 USC 1848 reads in pertinent part as follows:

> "Any party aggrieved by an order of the Board. . . .may obtain review of such order in the United States Court of Appeals. . . . "

The Respondents construe the word "order" to mean formal orders issued by the Board of Governors of the Federal Reserve System. The Petitioner contends that the word "order" as contemplated by Congress means acts of the Board giving rise to grievances. It was the vast regulatory scheme contained in the Bank Holding Company Act vesting in Respondents plenary powers to enforce the Act which Congress intended to be the subject of judicial review in order to restrain the abuses of arbitrary and rampant Federal power. Thus, as stated by the Court of Appeals, District of Columbia, in Investment Company Institute v. Board of Governors, 551 F.2d 1270, 1278 (1977), "In our view the purposes underlying section 9 [12 USC 1848] will best be served if 'order' is interpreted to mean any agency action capable of review on the basis of the administrative record." In the instance of the Petitioner, the "administrative record" before the Federal Reserve is a complete, detailed recitation of the matter complained of by the Petitioner to the Federal Reserve, including specific requests by Petitioner for appropriate action by the Federal Reserve.

The regulatory scheme contemplated by 12 USC 1844 is broad. Under 12 USC 1844(c) the Board of Governors of the Federal Reserve has plenary authority to examine registered bank holding companies and their subsidiaries. Under §1844(e) the Board may order bank holding companies to divest themselves of non-bank subsidiaries and invoke the jurisdiction of the District Court to enforce compliance. Under §1844(f) the Board is granted extensive investigatory and enforcement powers.

The Board's view is, stated simply, that its discretion to act or not to act under the Bank Holding Company Act is not subject to judicial review and that it is the sole judge of the propriety of its actions. It is, in essence, a forthright statement in favor of administrative absolutism. The Board's response to the Petitioner was to refuse to act on the specious ground that the Petitioner purportedly did not allege "illegal activities" by holding companies, despite the fact that he did in fact make such allegations. The Board's refusal to act on such manifestly false premises was unreasonable, arbitrary, and capricious and otherwise a gross abuse of discretion. As stated by this Court in Association of Data Processing Service Org. v. Camp, 397 U.S. 150, 157 (1970), "There is no presumption against judicial review and in favor of administrative absolutism (citations)."

The trend in administrative law in recent decades favors judicial review of administrative action. As stated in Medical Committee v. SEC, 432 F.2d 659, 666 (D.C. C.A. 1970) ". . .there is a strong presumption in favor of the court's power to review administrative action." Citing L. Jaffe's Judicial Control of Administrative Action, the court stated:

> " Congress, barring constitutional impediments, may indeed exclude judicial review. But judicial review is the rule. . . .It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest. . . .The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent."

Moreover, as stated by this Court in Barlow v. Collins, 397 U.S. 159, 166, 90 S. Ct. 832 (1970), "Indeed, judicial review of. . .administrative action is the rule, and nonreviewability an exception which must be demonstrated."

2. The Petitioner's First Amendment right ". . .to petition the government for a redress of grievances. . ." is denied by the Fifth Circuit's denial of judicial review.

Among the rights guaranteed to citizens under the First Amendment to the United States Constitution is the right to petition the government for a redress of grievances. This right was recognized under the First Amendment in order that citizens may have access to their government for a redress of their grievances as a simple expediency for making

government responsive to the citizens' needs and to achieve changes short of revolution. Very little case law exists to define the parameters of this right, compared with the plethora of case law for the other First Amendment rights. At the very least, the right to petition the government for redress of grievances implies an obligation or duty on the part of government to listen to a citizen's complaints in good faith. A summary dismissal of a citizen's petition for redress of grievances, as in the case of the Board's refusal to act based on false premises, would render the right meaningless. At the very least, the Board was under an obligation to investigate the Petitioner's complaint to determine whether it was meritorious.

This Court had an opportunity to comment on the right to petition the government for redress of grievances. See DeJonge v. Oregon, 299 U.S. 353 (1937). In Thomas v. Collins, 323 U.S. 516 (1945), this Court held that the right to petition for redress was akin to and inseparable from the rights of free speech, press and peaceful assembly.

3. The Court of Appeals' dismissal of Petitioner's request for judicial review, without opinion, is an apparent denial of Petitioner's right of access to the courts.

Among the Respondent's defenses to Petitioner's petition for judicial review of Respondent's action is Respondent's claim that the Petitioner has no standing to challenge

Respondent's action. Stated otherwise, the Respondent seeks to bar the Petitioner from the courtroom rather than contest with him on the basis of the merits of his claim. Despite the language of the statute, 12 USC 1848, which states that "any party aggrieved" may petition the Court of Appeals for judicial review, the Respondent defends that the Petitioner has no standing because he is alleged to have failed to demonstrate any injury that he has suffered or will suffer.

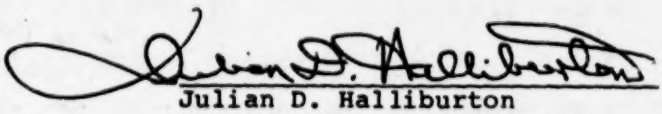
The issue of standing is governed by Article III of the U.S. Constitution. As stated by this Court in Gladstone Realtors v. Village of Bellwood, 60 L.Ed.2d 66 (1979), at p. 76, "In order to satisfy Article III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Throughout the proceedings before the Respondent, the Petitioner alleged injury and continuing injury as a result of the Respondent's failure to act. Given the language of the statute, 12 USC 1848, which gives access to the court to "any party aggrieved" and the liberality of the courts in recognizing standing in broader classes of litigants, the Petitioner ought not to be denied access to the court. In Sierra Club v. Morton, 405 U.S. 727 (1972) this Court opened the courts to litigants seeking judicial review of governmental actions adversely impacting the complainants' aesthetic sensibilities. The liberality of this approach to standing was extended in U.S. v. SCRAP,

412 U.S. 669 (1973), wherein students were recognized as having an interest cognizable under Article III to challenge railroad rates which could adversely impact the recycling of scrap materials. Moreover, in Trafficante v. Metropolitan Life Insurance Company, 409 U.S. 205 (1972), whites were acknowledged as "persons aggrieved" under the Civil Rights Act of 1968.

Surely all government which derives its just powers from the consent of the governed necessarily must account to the citizens for its conduct. The Congressional scheme in vesting plenary authority in the Respondents to examine and regulate bank holding companies and their subsidiaries was not a grant of license to act capriciously or in a manner which defeats the public purposes of the law. The Petitioner has pleaded injury resulting from the Respondents' inaction and on that account should be accorded standing to present his case to an impartial forum. Administrative abuse of discretion and judicial acquiescence in the same have no place in the Anglo-Saxon sense of fair play and due process of law. This alone would justify the grant of certiorari to review the order below.

## Conclusion

For these reasons, a writ of certiorari should issue to review the order of the Fifth Circuit.



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day in the City of Atlanta, State of Georgia, transmitted forty (40) copies of the foregoing by United States Mail, postage prepaid, to the Clerk, Supreme Court of the United States, Washington, D.C. 20543, and I FURTHER CERTIFY that I have this day in the City of Atlanta, State of Georgia, served the following by placing three copies of the foregoing in the United States Mail, postage prepaid, addressed to:

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This the 13th day of June, 1980.

Julian D. Halliburton
Attorney for Petitioner

## Appendix

Order of the United States Court of Appeals for the Fifth Circuit, entered March 19, 1980 in:

Case No. 79-2893

EDWIN F. GORDON,

Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM; FEDERAL RESERVE BANK OF ATLANTA; MONROE KIMBREL, PRESIDENT, FEDERAL RESERVE BANK OF ATLANTA,

Respondents

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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EDWIN F. GORDON,

Petitioner,

versus

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FEDERAL RESERVE BANK OF ATLANTA, MONROE KIMBREL, President, Federal Reserve Bank of Atlanta,

Respondents.

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Petition for Review of An Order of the Federal Reserve System

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Before BROWN, TJOFLAT and FRANK M. JOHNSON, JR., Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motions of respondents to dismiss the petition for review is GRANTED.